United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7429

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANNE K. UNGER,

Plaintiff-Appellant,

—against—

JOHN L. HETTRICK, DAVID J. LAUB, MARINE MIDLAND BANKS, INC. and PRICE WATERHOUSE & Co.,

Defendants-Appellees,

—and—

EDWARD W. DUFFY, CHARLES G. BLAINE, WM. WARD FOSHAY, ULRIC HAYNES, JR., ROBERT W. HUBNER, NORTHRUP R. KNOX, FELIX E. LARKIN, JOHN S. LAWSON, JAMES P. LEWIS, SOL M. LINOWITZ, WILLIAM A. LYONS, JAMES W. McKEE, JR., ALLEN H. NEUHARTH, DAVID H. NORTHRUP, NATHAN R. OWEN, CORNELIUS W. OWENS, CLIFTON W. PHALEN, GERALD C. SALTARELLI, PAUL A. SCHOELLKOPF, WILLIAM H. WENDEL, JOHN WILKIE, CHARLES A. WINDING and GERALD B. ZORNOW,

Defendants.

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

Preliminary Statement

This Reply Brief is submitted primarily in order to respond to the assertion made by Defendants-Appellees

(Defendants-Appellees' Brief, Pt. II) that this appeal should be dismissed on the ground that an appeal does not lie from the order of the District Court dismissing this action as a class action. It also will deal briefly with the authorities relied on by defendants-appellees in support of the proposition that substantial authority supports the action of the District Court.

POINT I

THIS APPEAL FROM DISMISSAL OF THE ACTION AS A CLASS ACTION IS PROPERLY BEFORE THIS COURT.

This Court has clearly and consistently recognized that denial of class action status, or, as here, dismissal of so much of the action as is brought as a class action, may properly be appealed from directly, pursuant to 28 U.S.C. § 1291, where the action has been brought representatively by a plaintiff having a small, not independently viable claim under the federal securities or antitrust laws, and where the denial of class action status effectively sounds the "death knell" of the suit. Eisen v. Carlisle & Jacquelin ("Eisen I"), 370 F.2d 119, 121 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967); Korn v. Franchard Corporation, 443 F.2d 1301 (2d Cir. 1971); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968).

Appellees now ask this Court to abandon this wise and practical line of decision and to adopt an a prioristic approach to the concept of finality which this Court and the

Supreme Court have rejected at least since the decision in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221 (1949). The principle that the finality requirement of Section 1291 must be given "a practical rather than a technical construction" (337 U.S. at 546) has been reaffirmed by the Supreme Court in Eisen v. Carlisle & Jacquelin ("Eisen IV") 417 U.S. 1256, 94 S. Ct. 2140 (1974), where the Court upheld the Court of Appeals' jurisdiction to consider the appeal from the District Court's allocation of class notice costs and its order permitting the action to proceed as a class action. See also, Sanders v. Levy, __ F.2d ____ (2d Cir., June 30, 1976), motion for rehearing en banc granted, ____ F.2d ____ (Sept. 30, 1976). In Eisen IV, the Court found the issue of appealability controlled by Cohen. It pointed to the language there which summarized the basis for the holding that an order denying defendants' effort to require plaintiff to post security for costs in a derivative action grounded in diversity of citizenship was appealable under Section 1291, and demonstrated its applicability to the class notice issue as follows:

"The Court summarized its conclusion in this way:

> 'This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that

appellate consideration be deferred until the whole case is adjudicated.' Ibid.

'Analysis of the instant case reveals that the District Court's order imposing 90% of the notice costs on respondents likewise falls within 'that small class.' It conclusively rejected respondents' contention that they could not lawfully be required to bear the expense of notice to the members of the petitioner's proposed class. Moreover, it involved a collateral matter unrelated to the merits of petitioner's claims. Like the order in Cohen, the District Court's judgment on the allocation of notice costs was 'a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it,' id., at 546-547, 69 S.Ct. at 1226, and it was similarly appealable as a 'final decision' under § 1291." (94 S. Ct. at 2149-2150.)

On this rationale, even apart from the "death knell" doctrine, we submit that the order here appealed from meets the Cohen-Eisen IV tests. It "conclusively rejects" plaintiff's contention that she may sue representatively -- an issue not related to the merits of, nor an "ingredient of," her individual cause of action. Apart from any particular verbal formulation, we submit that a gross anomaly would be created by any conceptual framework which resulted in a rule that an order allocating class action costs, where class action treatment is allowed, is final enough to be appealable, while an order dismissing the class action as such is not. In his concurring opinion in Korn v. Franchard Corporation, 443 F.2d 1301 (2d Cir. 1971), Judge Friendly expressed concern as to

the viability and equity of the "death knell" doctrine, suggesting the possible need for an en banc effort to articulate a less ad hoc standard which "will afford equality of treatment as between plaintiffs and defendants," and continuing,

> "Perhaps, before occasion for doing this should arise, we shall have received enlightenment from the Supreme Court." (443 F.2d at 1307.)

We submit that the Court in Eisen IV did provide substantial guidance in the direction favoring appealability, within the framework of the Cohen rationale. Surely, it has given no signal justifying the approach argued for by appellees here; and this Court has no reason to consider retreat from the holdings in Eisen I, Green and Korn. If anything, Eisen IV may well indicate that these cases took a narrower-than-necessary view of the appealability of orders denying class action status and thus effectively dismissing the class claims.

In any event, it is clear that the present parameters of the "death knell" doctrine encompass the present case. There can be no reasonable doubt but that this litigation will necessarily terminate if it is not permitted to continue as a class action. As the record shows, plaintiff Unger's total investment in the securities of Marine Midland Banks, Inc. was $1,841.14 -- the gross purchase price for 100 shares of common stock, including commission and other charges. (56a.) While the record is

silent as to the amount of damages claimed, such individual damages are obviously a fraction of that total amount. In Milberg v. Western Pacific Railroad Company, 443 F.2d 1301 (2d Cir. 1971), considered and decided with Korn, this Court said that an amount of individual damages approaching the $10,000 diversity jurisdiction minimum would be considered sufficient to allow the inference that an action would continue where class action status had been denied. Since the record in Milberg showed that plaintiff and her husband (the attorney who had signed her complaint) had claims amounting to approximately $8,500, the "death knell" doctrine was held inapplicable. In Korn v. Franchard Corporation, supra, the individual plaintiff asserted damages of $386; and eight additional interveners had losses totaling $1,930. Although these losses exceeded Mrs. Unger's total investment here, this Court had no difficulty holding the "death knell" doctrine applicable, without inquiry into plaintiff's, or interveners', total economic resources or other immaterial matters. 443 F.2d at 1306.

Similarly, this Court found it simple to uphold appealability in Green v. Wolf Corporation, supra, where plaintiff's total relevant investment was $1,042.27, and his total damages less than $1,000. Disposing of the appealability question in a footnote, the Court said:

"We note that the order striking the class action aspects of the complaint is appealable at this time, since if a class action is not permitted the litigation will very likely terminate without reaching the merits. Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966) (Eisen I), cert. denied 386 U.S 1035, 87 S.Ct. 1487, 18 L.Ed. 2d 598. Green obviously does not intend to press what will probably be an enormously complex and expensive action to recover less than $1,000." (406 F.2d at 295, n. 6.; emphasis added.)

In each of the cases in this Circuit, it was the viability or lack thereof of the individual action, as such, which determined the applicabiity or inapplicability of the "death knell" doctrine. The question was whether the individual plaintiff or plaintiffs could be expected to continue alone, in the absence of class action status. It is obvious that the Court did not find it necessary to speculate whether, should the plaintiff and her counsel behave irrationally, they might consider continuing an enormously complex and difficult litigation where the total possible recovery would be a minor fraction of the minimum jurisdictional amount. Appellees argue, citing Korn, that the silence of this record on the question whether any relative of plaintiff has purchased Marine Midland stock, as well as the absence of evidence as to her resources, potential interveners or anticipated total costs of the action, is the fault of plaintiff, and should lead to dismissal of the appeal. We submit that this Court has never required such evidence in support of the application of the "death knell"

doctrine, and should not commence to do so here. Plaintiff's personal resources have little, if any, bearing on the probability or rationality of continuing the action as an individual action, as was plainly recognized in both Green and Eisen I. Moreover, we submit that it has been correctly decided that collateral inquiry into the economic condition of plaintiff in connection with determination of class action questions is improper, and should not be permitted. See Sanderson v. Winner, 507 F.2d 477 (10th Cir. 1974). Apart from the question whether the cases cited for the contrary proposition place unreasonable burdens of disclosure upon plaintiffs, and unreasonably restrict the scope of appealability indicated to be proper under the Cohen-Eisen IV rationale, their citation in the context of the case at bar is wholly misleading. The holding in Gosa v. Securities Investment Co., 449 F.2d 1330 (5th Cir. 1971), as cited and followed in Share v. Air Properties G Inc., 45 U.S.L.W. 2043 (9th Cir., July 6, 1976), was that plaintiff "bears the burden of showing that death to the action would result from the failure to certify the class" only "where the amount in controversy leaves the question of viability in doubt." (Ibid.) In the Share case, the Court pointed out that, "at least one investor has a $17,000 claim, which is both liable and capable of being individually maintained." (Ibid.) No such circumstances exist in the instant case. Thus, if there is ever proper occasion for

... inquiry, we submit that it does not exist here.

In terms of the decisional law in this Circuit, and in the Supreme Court, the entire unviability of this litigation as an individual action is clear. Plaintiff's total potential recovery is well within the established guidelines for application of the "death knell" doctrine. The complexity and difficulty of the litigation is manifest from the Complaint, which asserts a course of omission and misrepresentation of complicated financial matter, over a period of several years. This is wholly unlike the Milberg case, where the factual issues "related to one statement published in Barron's." (443 F.2d at 1307.) The magnitude, if not the probable amount, of the costs of going forward alone can well be recognized by this Court from the record before it -- which evidences dogged and determined resistence by defendants and their counsel at every stage and suggests the legal resources arrayed against plaintiff. (See, e.g., Defendants' Marine Midland, et al., Interrogatories to Plaintiff, and the same defendants' Response to Plaintiff's Request for Production of Documents.)

Appellees' final argument -- that the omission to move for class action determination has resulted in a record inadequate to support a finding of appealability -- is wholly without merit; and is utilized in reality as the basis for

inappropriate ad hominem characterization (Defendants-Appellees' Brief, pp. 22-23). As already shown, the matters material and necessary for such determination are of record or constitute wholly proper inferences from the record. As to those items not already dealt with, the lack of interveners or potential interveners related to plaintiff or not -- if at all significant -- is manifest from their absence. Finally, that the information appellees claim is necessary would not have been made of record in the course of determining a class action motion is apparent from the fact that their extremely voluminous interrogatories sought no such data. Moreover, had appellees seriously believed that such facts should be before this Court in any more precise form, it was entirely open to them to seek to elicit them by moving to dismiss the appeal, as was done in the Korn and Milberg cases. No such motion was made, we submit, because no valid basis exists for dismissing this appeal; and it should, for all of the reasons set forth above, be entertained upon its merits.

POINT II

NEITHER THE AUTHORITIES CITED NOR THE POLICY CONTENDED FOR BY APPELLEES SUPPORT DISMISSAL OF THE CLASS ACTION HERE.

Appellees cite a series of cases, without any enlightening discussion, in an attempt to establish that

there is a long line of authority supporting the appropriateness of dismissal of the class action here. (Defendants-Appellees' Brief, p. 9.) However, these authorities do not in fact support their position. For example, in Sheridan v. Liquor Salesmen's Union, Local 2, 60 F.R.D. 48 (S.D.N.Y. 1973), involving a dispute between union members and their union, Judge Brieant specifically disclaimed reliance on Rule 11A(d); denying class action status on the basis of facts and questions of substantive law pointing to the conclusion that class action treatment was inappropriate. He said:

> "The Court is not required to dismiss a class action, or refuse class action status, simply because of failure to comply with the local rule. Dismissal is only one of several sanctions the Court may invoke under Rule 11A, and if this were the only problem presented, we would not penalize plaintiffs or their class because of counsel's failure to comply.
>
> * * *
>
> "Plaintiffs' motion to determine that the action be maintained as a class action is denied, on the merits, and without regard to their failure to comply with Local Civil Rule 11A(d)." (At 51, 55.)

Other authorities relied upon by appellees are equally immaterial. The case of Beaver Associates v. Cannon, 59 F.R.D. 508 (S.D.N.Y. 1973), was decided in the context of a motion by plaintiff, which had brought both class and derivative claims, for voluntary dismissal of its complaint. The motion was

unopposed. Rule 11A was cited in support of the proposition that, since there had been no class action determination, the class claims could be dismissed without requirement of notice to putative class members.

Similarly without bearing on the case at bar is Wolfson v. Solomon, 54 F.R.D. 584 (S.D.N.Y. 1972), where class action determination was granted, with certain issues reserved for later determination. Again, in Wurzberger, Morrow & Keough, Inc. v. Keystone Co. of Boston, 361 F. Supp. 627 (S.D.N.Y. 1973), the issue of applying sanctions for failure to make a timely class action motion never arose. Rather, the fact that no class action determination had yet been sought was cited as a factor in denying defendants' motion to transfer the case to the District of Massachusetts.

Herbst v. Able, 45 F.R.D. 451 (S.D.N.Y. 1968), also relied upon by appellees as being part of a large body of authority in their favor, makes no mention whatever of Rule 11A. Rather, the Court there, in dealing with 14 related cases arising out of the same transactions, struck the class action allegations in what were obviously "tag-along" cases. Counsel in those cases had failed to seek class action determination when the time for doing so had been set by the Court, in a conference with counsel for all parties. The effect of this decision was simply to select, from among the numerous and virtually

identical cases filed, the ones in which litigation on the merits would be allowed to go forward. In Sanders v. Lum's, Inc., 1975-'76 CCH Fed. Sec. L. Rep. ¶ 95,536 (S.D.N.Y. 1976), Judge Motley, author of the Herbst opinion, made clear that she did not consider it precedent for termination of a class action for a mere omission to comply with Rule 11A.

Appellees also purport to present authority for the proposition that plaintiff's failure "expeditiously" to seek class determination has been the basis for recent decisions in which the Court has stricken class allegations "on its own motion." (Defendants-Appellees' Brief, p. 9.) Again, the authorities do not support the argument. In Yulio v. Moore-McCormack Lines, Inc., 387 F. Supp. 872 (S.D.N.Y. 1975), the Court held that an attempt to cast the action as a class action should be disregarded where the case had proceeded to trial and to judgment for defendants on the merits, in an action for severance pay by two marine engineers against their union and their former employers. The plaintiffs' claims had been held to be barred by the terms of a collective bargaining agreement, and a preceding arbitration award. The case of Jeffery v. Malcolm, 353 F. Supp. 395 (S.D.N.Y. 1973), is similarly immaterial to the case at bar. There, Judge Pollack determined the action on its merits, granting defendant's motion to dismiss for failure to state a claim, pursuant to Rule 12(b)(6) of the

Federal Rules of Civil Procedure. Plaintiff, a state prisoner, had brought the action pro se, purporting to challenge certain provisions of the New York Penal Law on constitutional grounds. Apart from its determination of the merits, the Court's reasons for allowing the action to proceed only as an individual case were succinctly stated:

> "The ordinary layman will generally not possess the requisite training, expertise, and experience to be able to adequately serve the interests of a proposed class. The plaintiff has not asserted or evidenced any special qualifications which might justify maintenance by him, pro se, of a class action." (At 397.)

Once again, we submit, Rule 11A was not used to prevent litigation of the merits of a legitimate representative case.

In sum, the substantial body of authority that the moving defendants claim supports the proposition that the class action allegations in the case at bar should be, or even must be, stricken simply does not exist.

Apart from the dubious authorities relied upon, appellees seek to buttress their argument by reference to the imagined horrors inherent in the class action as such, and by the bald assertion that a litigant has only a privilege, and not a right, to sue in the representative form. (Defendants-Appellees' Brief, pp. 12-14.)

The short answer to the "privilege" argument is that the Federal Rules give a litigant a right -- and not a

privilege -- to bring any type or form of action contemplated by our system of procedure; and indicate no hierarchy of desirability as to one or another type of lawful litigation. With all due respect for the cited dictum in Eisen III (id. at 13), we submit that the proper point of view with which to contemplate the class action was more aptly stated by Judge Weinstein at the 1973 Class Action Symposium of the Fifth Judicial Circuit. There, responding to criticisms of the class action, he said:

> "It seems to me that this matter touches on the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for the adjudication of disputes involving all our citizens -- including those deprived of human rights, consumers who overpay for products because of antitrust violations, and investors who are victimized by misleading information -- or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce, while unwilling to grant a civil remedy against a corporation, which has benefited to the extent of many millions of dollars from collusive, illegal pricing of goods.
>
> "When the organization of a modern society, such as ours, affords the possibility of illegal behavior, accompanied by widespread diffuse consequences, some procedural means should exist to remedy or at least deter that conduct.
>
> "That is not to say that we can solve all social ills or even that all justiciable controversies of broad public concern merit class action status. We are just beginning to feel our way in the direction of appropriate limits, as in the recent case on behalf of all Americans who may at some time wish to express unpopular beliefs. That was a class action. The court dismised the class action allegations as insubstantial atmosphere.

"The solution, it seems to me, will have to come from a case by case interpretation of subtle doctrines and standards, and not by a rigid narrowing of the Rule, preventing those who need it from obtaining appropriate redress." (58 F.R.D. 299, 305 (1973).)

CONCLUSION

For all of the reasons set forth herein, and in appellant's main brief, this Court should reverse the order and decision of the District Court, and should remand the cause for further appropriate proceedings.

Respectfully submitted,

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REPLY BRIEF is admitted this
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